DYNACAST (S) PTE. LTD.

v.

LIM MENG SIANG & ORS.

HIGH COURT, SINGAPORE
CHAO HICK TIN JC (SUP. CT)
[SUIT NO. 1140 OF 1989]
25 AUGUST 1989

CIVIL PROCEDURE: *Injunction - Anton Piller order - Ex parte - Possession of confidential information - Breach of confidentiality agreement - Serious risk that information will be destroyed - Discharge of order - No full and frank disclosure - No evidence or no adequate evidence - No real cause of action - Just 'fishing'.*

The plaintiffs are manufacturers of small precision metal and plastic components. The defendants were formerly the employees of the plaintiffs, having at different times resigned from the employment of the plaintiffs.

The plaintiffs bought an action to restrain the defendants from making use of the plaintiffs confidential/proprietary information and/or property without the plaintiffs' consent and to require the defendants to return to the plaintiffs all books, equipment software and other property of the plaintiffs which are in the defendants possession.

In the meantime, the plaintiff was granted an *ex parte* Anton Piller order permitting the plaintiffs by their representatives to enter the defendants' premises to search for and remove certain specified documents and articles of the plaintiffs.

The defendants now pray for (i) discharge of the interim order (ii) the documents and articles taken by the plaintiffs as a result of the Anton Piller order be returned to the defendants or their solicitors within 3 days and (iii) there be an inquiry as to damages suffered by the defendants.

In support of the discharge of the interim order, the defendant contended, firstly, there was no full and frank disclosure of material facts. Secondly, there was no evidence or no adequate evidence for granting the interim order. Thirdly, the plaintiffs do not really have a cause of action and are just 'fishing'.

Held:

[1] There was non-disclosure of the source of information. Such information could not be disclosed by subsequent affidavit, such evidence should not be admitted, as the consequences of admitting such evidence would be serious and it could undermine the principle of full and frank disclosure. It could also lead to the opening of the floodgate and to abuse.

[2] Without identifying the source, evidence set out in para. 14 and 15 is inadmissible, thus there is no evidence and no basis at all for making the Anton Piller order.

[3] The statement of claim sets out clearly what is the cause of action and what relief the plaintiffs seek and therefore the plaintiffs were not just 'fishing'.

[4] The Anton Piller order should be discharged on the 1st and 2nd grounds and the defendants were to give an undertaking that articles and documents returned would be kept by him in safe-custody until trial. The articles and documents seized by the plaintiff were to be returned to the defendants' solicitor within 5 days and the inquiry as to damages should be deferred until the trial of the action.

[Order accordingly.]

Cases referred to:
R. v. General Commissioners of Income Tax for Kensington [1917] 1 KB 486
Thermax Ltd. v. Schoot Industrial Glass Ltd. [1981] FSR 289
Lloyd Bowmaker Ltd. v. Britannia Arrow Holdings PLC [1988] 3 All ER 178
Brink's Mat Ltd. v. Elcombe [1988] 3 All ER 188
Dormeuil Freres SA v. Nicolian Ltd. [1988] 1 WLR 1362
WEA Records Ltd. v. Visions Channel 4 Ltd. [1983] 1 WLR 721
Savings and Investment Bank Ltd. v. Gasco [1984] 1 WLR 271
Re J. L. Young Manufacturing Company Ltd. [1900] 2 Ch 753
Booker McConnell plc v. Plasgow [1985] RPC 425

Legislation referred to:
Rules of the Supreme Court [Sing], O. 2 r. 1, O. 41 rr. 3, 4, 5, 5(2), O. 91 r. 4, O. 92 r. 4

Other source referred to:
White Book [1988]

For the plaintiffs - Shunmugam
For the defendants - George Lim

JUDGMENT

Chao Hick Tin JC (Sup. Ct):

The plaintiffs are manufactures of small precision metal and plastic components. They are a wholly owned subsidiary of a multinational corporation with headquarters in the United Kingdom. The defendants were formerly the employees of the plaintiffs, having at different times resigned from the employment of the plaintiffs.

The aim of the present action is essentially to restrain the defendants from making use of the plaintiffs' confidential/proprietary information and/or property without the plaintiffs' consent and to require the defendants to return to the plaintiffs all books, equipments software and other property of the plaintiffs which are in the defendants' possession.

By an *ex-parte* application made to the Judge in chambers, the plaintiffs were, on 16 June 1989, granted an Anton Piller order permitting the plaintiffs by their representatives to enter the defendants' premises to search for and remove certain specified documents and articles of the plaintiffs. The Anton Piller order was executed on the same day and the plaintiffs recovered a number of articles and documents pursuant thereto. The thing recovered were duly recorded and acknowledged by both parties.

The matter now before me is a motion by Counsel for the defendants praying that (i) the interim order made on 16 June 1989 be discharged; (ii) the documents and articles taken by the plaintiffs as a result of the execution of the Anton Piller order be returned to the defendants or their solicitors within three days; and (iii) there be an inquiry as to damages suffered by the defendants.

Counsel for the defendants raised three grounds in support of the contention that the interim order should be discharged. Firstly, there was no full and frank disclosure of material facts on the part of the plaintiffs at the time when the interim order was obtained. Secondly, there was no evidence, or no adequate evidence, before the Judge for him to make the interim order. Thirdly, the plaintiffs do not really have any cause of action and are just fishing.

The affidavit in support of the application for the interim order was affirmed by one John Wilson, the managing director of the plaintiffs and filed on 14 June 1989. In this affidavit, Mr. Wilson gave a brief account of the employment of each of the three defendants, together with an indication of the sort of proprietary and confidential information to which each defendant was given access to. At the time of the termination of employment of the 1st and 2nd defendants, they were each told in writing not to directly or indirectly disclose or use "any Dynacast confidential information which was gained during your employment with us". Both the 2nd and 3rd defendants had each, on 15 July 1987, long before their resignation, signed a confidentiality agreement, under which each of them agreed:

> (a) not, directly or indirectly, to disclose or make available to anyone or to use outside the company organisation during or after my employment, any confidential information ...
>
> (b) in the event of termination of my company employment, promptly to deliver to the company all materials ... in my possession or control ...

In the said affidavit, Mr. Wilson also stated that it has come to his knowledge that the 1st defendant has started a business in direct competition with the plaintiffs and has employed the 2nd and the 3rd defendants. Then followed two paragraphs which are the paragraphs now under contention before me and it is necessary that I set them out in full:

> 14. It has come to my knowledge, yesterdays, that Lim, Lynda and Han are in possession of confidential and proprietary information and articles which were taken from the plaintiffs, without the plaintiffs' knowledge or permission. Annexed hereto and marked "JGW5" are the types of property/information that the defendants are likely to have obtained. I have also come to know that the defendants intend to destroy this information and articles should the plaintiffs come to know of the same.
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> 15. I verily believe that the defendants must have obtained the said information and articles when they were, employed by the plaintiffs. The defendants' conduct in this matter has been untrustworthy and questionable. There is a serious risk of the information and articles being destroyed and/or spirited away. Further, the plaintiffs' would suffer irrepairable harm should the defendants continue to have access to and use the plaintiffs' information and articles. Accordingly, the plaintiffs pray for an order in terms of this application.

Let me at the outset briefly dispose of the third ground: fishing. The statement of claim sets out clearly what is the cause of action and what reliefs the plaintiffs seek. In the application for the Anton Piller order, they specified what nature of articles and documents they were looking for. Quite clearly, there is no merit in this ground and Counsel for the defendants quite rightly did not seriously pursue it.

No Full and Frank Disclosure

The first ground of objection relates to the words "it has come to my knowledge yesterday" and "I have also come to know" in para. 14 of Mr. Wilson's affidavit. Counsel for the defendants submitted that by not disclosing the source of that information there was a lack of full and frank disclosure of a material fact on the part of the plaintiffs and following the decision of the Court of Appeal in *R v. General Commissioners of Income Tax for Kensington*

[1917] 1 KB 486, the interim order should be discharged without going into the merits. Counsel also cited to me *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] FSR 289, which extended the principle to a situation where the failure to disclose was due to an error of judgment rather than to a deliberate attempt to mislead.

However, the rigour of this principle has in recent years been tampered with in a number of cases, e.g., *Lloyd Bowmaker Ltd. v. Britannia Arrow Holdings PLC* [1988] 3 All ER 178 and *Brink's Mat Ltd. v. Elcome* [1988] 3 All ER 188. These authorities led Sir Nicolas Browne-Wilkinson V-C in *Dormeuil Freres SA v. Nicolian Ltd.* [1988] 1 WLR 1362 to clarity the principle established in the earlier cases thus at 1368:

> It is a basic principle, applicable to all *ex-parte* applications, that a plaintiff seeking *ex-parte* relief must make full disclosure to the Court of all facts which are material to the exercise of the Court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the Court may discharge the *ex-parte* injunction on that ground alone. But if, in the circumstances existing when the matter comes before the Court *inter-partes*, justice requires an order either continuing the *ex-parte* injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an *ex-parte* order obtained without due disclosure set aside; there is a discretion in the Court whether to do so or not.

Of course that discretion, as Balcombe LJ stated in *Brink's Mat Ltd.* at p. 194, is one to be exercised sparingly. The original non-disclosure must be innocent. All three members of the Court of Appeal in *Brink's Mat Ltd.* defined an innocent non-disclosure as one where there was no intention to omit or withhold information which was thought to be material.

Paragraph 14 of the affidavit of Mr. Wilson clearly did not disclose the source of his information. That is undoubtedly a material fact. At the first hearing before me on 11 August 1989, Counsel for the plaintiffs informed the Court that at the hearing of the *ex-parte* application, he drew the attention of the Judicial Commissioner to this very point of the source of the information and indicated to the Judicial Commissioner that his clients would prefer to keep the source confidential. Counsel said that the Judicial Commissioner did not require his client to file a supplementary affidavit to disclose the source. Counsel, therefore, submitted to me that there was no question of non-disclosure. However, I should point out that the minutes of the Judicial Commissioner did not record that fact at all.

At the further hearing on 18 August 1989, I suggested to Counsel for the plaintiffs that perhaps he should state precisely in an affidavit what he told the Judicial Commissioner at the *ex-parte* hearing. This he did during the mid-day adjournment, Counsel deposed that he told the Judicial Commissioner hearing the *ex-parte* application that:

> (b) ... the source of information of Mr. Wilson (as to the fact that the defendants were in possession of the plaintiffs' property and intended to destroy it should the plaintiffs take any steps) was an employee of the plaintiffs;
>
> (c) ... the plaintiffs prefer not to state this on affidavit, in order to preserve confidentiality;
>
> (d) ... this employee had been told the above information by the third defendant.

However, Counsel for the defendants objected to the filing and service of the affidavit at that late stage. He argued that it did not seem to be appropriate for evidence of such a nature to be introduced in this manner, bearing particularly in mind that the Judge's minutes did not mention anything about this aspect at all. He further said that what was stated in

para. (d) would have to be refuted and he would not have the opportunity to do so without the hearing being further adjourned. Counsel for the plaintiffs in reply said that he would be prepared not to rely on para. (d) if that para should pose a problem.

It seems to me that the question whether such evidence as deposed to by Counsel for the plaintiffs should be admitted is one of some importance. Counsel relied on *WEA Records Ltd. v. Visions Channel 4 Ltd.* [1983] 1 WLR 721 to argue that if an interim order could be obtained, in an appropriately urgent case, without any written application or affidavit being filed, subject to an undertaking to file the papers shortly thereafter, surely what the plaintiffs now seek to do is covered by that situation. I am afraid I do not share that view as I do not see the two situations being in parallel. A Judge who grants an interim order, without a written application, would have recorded in brief the facts and points mentioned by Counsel and Counsel is expected to swear and file an affidavit setting out what he told the Judge. That situation and the present are different. Having given the matter the most anxious consideration, I am inclined to agree with Counsel for the defendants that such evidence should not be admitted. The consequences of admitting such evidence could be serious. It could undermine the principle of full and frank disclosure. It could lead to the opening of the floodgates and to abuse. If there is a point of importance not covered by the affidavit and Counsel would like to convey the same to the Judge, the proper course would be for Counsel to request the Judge to specifically record that point. That, I understand, is in fact the general practice. And if the Judge has not been requested to make any such recording, then as a matter of policy I do not think it is desirable to permit the introduction of such evidence through a subsequent affidavit. There will be difficulty in verifying the truth of such evidence without having to ask the Judge who heard the *ex-parte* application, who in turn might have difficulties in recalling, let alone precisely, what Counsel told him. I would not sanction any step which would bring about such a state of affairs. I must hasten to add that in stating the foregoing, I am not for a moment suggesting that what Counsel for the plaintiffs deposed to here is not or could not be true. I have ruled based purely on general policy considerations.

No Evidence before Court to grant Anton Piller Order

Turning to the second ground, the argument here rests on O. 41 r. 5 of the RSC. As a general rule an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. Rule 5(2) of that order creates an exception and provides that "an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof." *In Savings and Investment Bank Ltd. v. Gasco* [1984] 1 WLR 271 at 282, Peter Gibson J said:

> To my mind the purpose of r. 5(2) is to enable a deponent to put before the Court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief.

In *Re J.L. Young Manufacturing Company Ltd.* [1900] 2Ch 753 it was held that an affidavit of information and belief, not stating the source of the information or belief, was irregular, and therefore inadmissible as evidence. Of course, that case was governed by the then rule, O. XXXVIII r. 3, which provided that "an affidavit shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which

statements as to his belief, with the grounds thereof, may be admitted..." While the wording of that rule may be different from our present O. 41 r. 5, I am of the opinion that in substance the meaning of the two rules is the same.

In *Savings and Investment Bank Ltd.*, the Court applied *Re Young Manufacturing Co. Ltd.* and held that statements of information or belief have no probative value unless the sources and grounds of the information and belief are revealed.

Quite clearly paras. 14 and 15 of the said affidavit of Mr. Wilson do not identify the source(s) of the information. I accept the submission of Counsel for the defendants that without identifying the source, paras. 14 and 15 are entirely inadmissible; they are purely hearsay evidence. And without those two paragraphs, there is no evidence and no basis at all for making the Anton Piller order in the instant case.

Counsel for the plaintiffs urged this Court to exercise its discretion under O. 41 r. 4, O. 2 r. 1 and O. 91 r. 4 of the RSC and accept the evidence set out in paras. 14 and 15 notwithstanding that the source was not disclosed.

Order 41 r. 4 provides that "an affidavit may with leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof." Now the question is: is an omission to state the source a matter of form. I do not think so. The examples cited in para. 41/4/1 of the *White Book* [1988] do not appear to support the contention that such an omission is a matter of form. Counsel also argued that as he had orally indicated to the Judicial Commissioner the source, the omission is thus one of form. For the reasons dealt with above under the first ground, I do not think the evidence tendered as to what transpired before the Judicial Commissioner should be admitted. In any event, Counsel also admitted that the Judicial Commissioner attention was never drawn to r. 5(2).

As regards O. 2 r. 1, it provides that a failure to comply with the requirements of the RSC rules, whether in respect of, *inter alia*, form or content, shall be treated as an irregularity. The Court has the power either to set aside wholly or in part the proceedings or to allow amendments to be made. I do not think that a failure of such a kind like the present which in effect means that there was no evidence before the Court warranting the grant of an interim order is one which this Court should overlook and grant indulgence. Order 41 r. 5(2) is an exception to the general rule that a person can only depose to what he knows. If a deponent does not comply with O. 41 r. 5(2), then his evidence is no evidence at all and cannot be relied upon. It is a defect of a fundamental nature.

Finally, as regards O. 92, r. 4, that rule merely declares that the Court has the inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. I do not think that that Rule carries the case of the plaintiffs any further.

Should The Interim Order be Set Aside?

It is clear that non-disclosure of material facts could be a ground for discharging an *ex-parte* interim order. But as stated by Browne-Wilkinson V-C in *Dormeuil Freres* there is a discretion in the Court. In the present case it seems to me clear that the non-disclosure was due to a mis-judgment.Though it was not omitted with the intention to mislead the Court I have some doubts whether this is a case of an innocent non-disclosure as described in *Brink's-Mat Ltd*. Nevertheless if this were the only ground for me to decide whether to set

aside the Anton Piller order, I would have hesitated to reflect further. But coupled with the second ground discussed above, the case for setting aside the interim order becomes quite obvious.

One final point: should an Anton Piller order be discharged after it has been executed. In *Booker McConnell plc v. Plasgow* [1985] RPC 425 the Court of Appeal held that even a fully executed order could be discharged if it is established that it should never have been made. However, Kerr LJ amplified this point further at p. 435 as follows:

> If the sole reason for seeking a retrospective discharge of the order is to enforce the cross-undertaking as to damages, then I can see no ground for any immediate application. Any issues as to the validity of the order or as to the consequences of its invalidity should generally be left to be dealt with at the trial of the action.

Dillon LJ expressed very similar views at p. 443:

> An application to set aside an Anton Piller order which has not yet been executed has of course to be decided with expedition in order to establish whether or not the order will be executed. It is otherwise where the order has already been fully executed and in such a case the Judge to whom application to set aside such an order is made would in my judgment be entitled in his discretion, if he thought fit in a particular case, to direct that the application to set aside the order, with any ancillary matters of costs or of directing an inquiry as to damages on the cross-undertaking, be adjourned to the Judge at trial of the action.

In the present case, there is a pending application by the plaintiffs to seek the approval of the Court to make use of the articles and documents seized pursuant to the Anton Piller order for another purpose. Therefore, the present motion to discharge the Anton Piller order is not merely to enforce the undertaking as to damages. In the premises, I would order that the Anton Piller order be discharged. But I would order that the inquiry as to damages be deferred until the trial of the action. I do not see any urgent need for the inquiry on damages to be held right away. Indeed, I do not think that it has been shown that any damages had been sustained by the defendants as a result of the execution of the order.

For the record I would state that Counsel for the defendants gave this Court an undertaking that, if the interim order were discharged, the articles and documents returned would be kept by him in safe-custody until trial. It seems to me that that should be sufficient to safeguard the position of both parties until trial.

Accordingly I order: (i) the interim order of 16 June 1989 be discharged; (ii) the articles and documents seized pursuant to the order be returned to the solicitors for the defendants within five days; (iii) an inquiry as to damages, if any, be deferred until trial and (iv) costs of this motion by the defendants' in any event.

Also found at [1989] 2 CLJ 1116